STATE OF MICHIGAN

COURT OF APPEALS

KATRINA BONNELL,

Plaintiff-Appellant,

v

MATHEW A. BONNELL,

Defendant-Appellee.

UNPUBLISHED
May 13, 2014

No. 318445
Ogemaw Circuit Court
Family Division
LC No. 06-655774-DM

Before: OWENS, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order increasing defendant's parenting time with the parties' minor child.[1] We affirm.

I. FACTUAL BACKGROUND

The parties were married in 2002 and had one daughter, born in 2003. The parties separated in 2006, and plaintiff eventually filed a complaint for divorce. At the time of the divorce proceedings, the minor resided in West Branch, Michigan.

On July 27, 2009, a judgment of divorce was entered and the trial court ordered joint legal and physical custody of the minor. The court further provided that "[p]arenting time shall be as agreed between the parties." According to defendant, he exercised parenting time every other weekend, one weekday, every other week in the summer, and some additional days. However, in November 2011, defendant moved from West Branch to Bay City with his fiancée and her son.

[1] To the extent that the trial court order was not appealable as of right because it only constituted a change in parenting time, MCR 7.202(6)(a)(*iii*), "in the interest of judicial economy, [we] exercise our discretion to treat [plaintiff's] claim of appeal as an application for leave to appeal, grant leave, and address the change-of-custody issue presented." *Wardell v Hincka*, 297 Mich App 127, 133 n 1; 822 NW2d 278 (2012).

On July 19, 2012, defendant filed a motion for parenting time, claiming that the parties could no longer agree.[2] Defendant subsequently filed an amended motion for parenting time and a motion to change custody. He alleged that plaintiff unilaterally removed the minor from Catholic school and enrolled her in public school, the minor's grades had suffered, it was likely that plaintiff would leave the minor under the authority of plaintiff's two older sons, and that plaintiff was refusing to attend to the minor's medical needs such as eyeglasses and counseling.

A hearing was conducted and the parties testified to the difficulties they encountered with each other. Defendant and his fiancée claimed that plaintiff often referred to them in pejorative terms in front of the minor, such as calling the fiancée an "ugly welfare whore" and "white trash" and calling defendant "dumb," "stupid," and "scary looking." Plaintiff admitted to using derogatory terms when referring to defendant and his fiancée, but denied saying them in front of the minor. The minor's school record also was at issue, as plaintiff testified that the minor experienced bullying at her school in West Branch, which prompted plaintiff to enroll the minor in a public school in West Branch. Plaintiff claimed that the minor was doing well at her new school.

Defendant alleged that he took the minor to the dentist when her teeth hurt and the eye doctor when she had trouble with her vision, and that plaintiff had ignored the minor's medical needs. Defendant lived in Bay City with his fiancée and her mentally handicapped son, and the minor at issue in this case had her own room. Another issue that arose was that the daughter of defendant's fiancée had psychological issues and had referenced killing the minor. Defendant and his fiancée immediately sent the fiancée's daughter to live with grandparents, and she had no further contact with the minor at issue in this case.

The trial court ultimately denied defendant's request to change custody but granted his request to modify the parenting time schedule. The court found that there was an established custodial environment with both parties and that joint legal and physical custody should continue. The court found that it was in the best interests of the minor to attend school in Bay City and live with defendant during the school year. The trial court ordered plaintiff's parenting time during the school year as follows: three weekends every month (including Thursdays if the minor did not have school on a Friday) and Wednesdays from 5:00 p.m. to 8:00 p.m. In the summer, plaintiff received two weeks to every one week defendant received, and the court also divided holiday time. Plaintiff now appeals on several grounds.

II. STANDARDS OF REVIEW

As we recognized in *McIntosh v McIntosh*, 282 Mich App 471, 474-475; 768 NW2d 325 (2009):

[2] Based on the referee recommendation, the trial court ordered defendant's interim parenting time as follows: every other weekend and one weekday, holidays divided, and every other week during the summer.

> We apply three standards of review in child custody cases. First, the trial court's findings of fact are reviewed under the great weight of the evidence standard and will be affirmed unless the evidence clearly preponderates in the opposite direction. The trial court need not comment on each item of evidence or argument raised by the parties, but its findings must be sufficient for this Court to determine whether the evidence clearly preponderates in the opposite direction. This Court defers to the trial court's determinations of credibility. Second, a trial court commits clear legal error under MCL 722.28 when it incorrectly chooses, interprets, or applies the law. Third, discretionary rulings are reviewed for an abuse of discretion. [Quotation marks omitted.]

Relevant to this case, "[w]hether an established custodial environment exists is a question of fact that we must affirm unless the trial court's finding is against the great weight of the evidence." *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008).

III. ESTABLISHED CUSTODIAL ENVIRONMENT

Pursuant to MCL 722.27(1)(c):

> The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

While an established custodial environment may exist with one parent or neither, it may also exist "with both parents where a child looks to both the mother and the father for guidance, discipline, the necessities of life, and parental comfort." *Berger*, 277 Mich App at 707.

In the instant case, plaintiff contends that the trial court did not apply the proper legal framework because an established custodial environment existed exclusively with her. Plaintiff concludes that defendant was seeking a change in the custodial environment, which the trial court misapprehended. We disagree.

Defendant lived with the minor during the marriage, and continued to spend time with her on a regular basis after the separation. The minor had a permanent place in defendant's home, as she had her own room at his house in Bay City. As to guidance, defendant testified that he and his fiancée helped the minor with her homework, disciplined her, and engaged in religious lessons at home. The testimony also demonstrated that the minor naturally looked to defendant for the necessities of life, such as taking care of her medical needs. In fact, defendant claimed that he obtained medical treatment for the minor over plaintiff's objections. Defendant also verified that the minor sought parental comfort from him. He testified that the minor would call him crying when she was upset with something that occurred at plaintiff's house. Moreover, a Child Protective Services (CPS) investigator testified that while the minor was comfortable at both parties' homes, she preferred living with defendant.

Accordingly, the trial court's finding that an established custodial environment also existed with defendant was not against the great weight of the evidence. [3]

Similarly, the trial court properly found that the parenting-time modification would not alter the minor's established custodial environment. Plaintiff mistakenly argues that the established custodial environment necessarily changed because it relegated her to a "weekend" parent. In *Gagnon v Glowacki*, 295 Mich App 557, 573; 815 NW2d 141 (2012), this Court recognized that, in a change of domicile case, when a change in parenting time resulted in the defendant becoming a "weekend-only parent," then "a change in the established custodial environment would result." However, the trial court's ruling in this case did not render plaintiff a "weekend-only" parent because she was allowed regular mid-week parenting time every Wednesday during the school year. See *Gagnon*, 295 Mich App at 573-574 (the defendant was not relegated to a weekend parent because "[t]he trial court's order made it clear that defendant would maintain his weekday parenting time.").

Moreover, the reduction in plaintiff's parenting time did not alter the established custodial environment. Although "an important decision affecting the welfare of the child may well require adjustments in the parenting time schedules, this does not necessarily mean that the established custodial environment will have been modified." *Pierron v Pierron*, 486 Mich 81, 86; 782 NW2d 480 (2010). "If the required parenting time adjustments will not change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then the established custodial environment will not have changed." *Id.* In the instant matter, the reduction in plaintiff's parenting time was not so extensive as to preclude the minor from naturally looking to plaintiff for guidance, discipline, the necessities of life, and parental comfort. MCL 722.27(1)(c). During the school year, plaintiff has parenting time three weekends every month, and every Wednesday from 5:00 p.m. to 8:00 p.m. Further, plaintiff was given all of the minor's Christmas break except for Christmas Eve, all of her spring break, and the majority of her summer break.

Therefore, plaintiff has not demonstrated that reversal is warranted.

IV. PROPER CAUSE OR CHANGE OF CIRCUMSTANCES

Next, plaintiff contends that the trial court improperly modified its prior custody order without finding proper cause or change of circumstances.

A party seeking to change custody first must establish proper cause or a change of circumstances. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003); MCL 722.27(1)(c). The definition of "proper cause" or "change of circumstances" depends on the

[3] Plaintiff also asserts that the trial court failed to make the established custodial environment finding before considering defendant's motion to change custody and amend parenting time. However, the record establishes that the trial court ruled that an established custodial environment existed with both parents before ruling on defendant's motion.

custody decision at issue. *Shade v Wright*, 291 Mich App 17, 28-31; 805 NW2d 1 (2010). In *Vodvarka*, 259 Mich App at 512, this Court detailed what is meant by "proper cause" and "change of circumstances" sufficient to warrant a change of custody. "[P]roper cause means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken" and the grounds "should be relevant to at least one of the twelve statutory best interest factors" in MCL 722.23. *Id.* at 511. Alternatively, "in order to establish a 'change of circumstances,' a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id.* at 513 (emphasis in original). "[T]he evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child." *Id.* at 513-514.

However, "a more expansive definition of 'proper cause' or 'change of circumstances' is appropriate for determinations regarding parenting time when a modification in parenting time does not alter the established custodial environment." *Shade*, 291 Mich App at 28. "Whereas the primary concern in child custody determinations is the stability of the child's environment and avoidance of unwarranted and disruptive custody changes, the focus of parenting time is to foster a strong relationship between the child and the child's parents." *Id.* at 28-29; MCL 722.27a. Further, "the very normal life change factors that *Vodvarka* finds insufficient to justify a change in custodial environment are precisely the types of considerations that trial courts should take into account in making determinations regarding modification of parenting time." *Id.* at 30.

Contrary to plaintiff's assertions on appeal, defendant alleged a change of circumstance beyond his decision to move to Bay City. Specifically, defendant argued that plaintiff refused to provide basic and necessary medical care for the minor, that she failed to help the minor with her homework, that the minor was not doing well in school, and that plaintiff unilaterally enrolled her in a different school. Furthermore, "[w]hile plaintiff is correct that the trial court did not explicitly state a proper cause or change in circumstances to justify the change, the trial court's analysis of the best-interest factors demonstrates" its implicit finding to that effect. *Rains v Rains*, 301 Mich App 313, 341; 836 NW2d 709 (2013).

Specifically, the trial court found that the minor wanted to spend more time and live with defendant. The trial court also found credible evidence that plaintiff was verbally abusive to defendant and his fiancée in front of minor. Both of these occurrences were likely to have a significant effect on the minor's well-being. See *Vodvarka*, 259 Mich App at 512-513. There also was evidence of normal life changes sufficient to warrant a mere change of parenting time, as the minor was having significant problems in school, defendant was more of a resource for

homework, and defendant was providing the minor with medical care that plaintiff apparently refused. Accordingly, we find no error requiring reversal.[4]

V. BEST-INTERESTS DETERMINATION

We also find no error in the trial court's ruling that the change of parenting time was in the minor's best interest.

If a "proposed change does not change the custodial environment," then "the burden is on the parent proposing the change to establish, by a preponderance of the evidence, that the change is in the child's best interests." *Shade*, 291 Mich App at 23. "Both the statutory best interest factors in the Child Custody Act, MCL 722.23, and the factors listed in the parenting time statute, MCL 722.27a(6), are relevant to parenting time decisions." *Id.* at 31. While "[c]ustody decisions require findings under all of the best interest factors, . . . parenting time decisions may be made with findings on only the contested issues." *Id.* at 31-32. Moreover, a trial court need not explicitly address the parenting time factors in MCL 722.27a(6) when it is "clear from the trial court's statements on the record that the trial court was considering the minor child's best interests in modifying defendant's parenting time." *Id.* at 32. Nor is a trial court required to explicitly address the best interest factors in MCL 722.23 when the modification of parenting time does not result in a change of custody. *Id.* at 32.

In the instant case, the trial court articulated its findings in the framework of the best interest factors found in MCL 722.23, which are:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
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> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

[4] We also find no error in the minor being interviewed or the court conducting the evidentiary hearing, as the trial court implicitly made the threshold finding, which justified further proceedings. Moreover, the trial court was not required to conduct a separate hearing on proper cause or change of circumstances. *Mitchell v Mitchell*, 296 Mich App 513, 519; 823 NW2d 153 (2012).

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

The trial court concluded that factor (d) slightly favored plaintiff, but that factors (i) and (*l*) favored defendant, with the remaining factors weighing equally. The trial court found that the minor was able to express her preference to live with defendant, and that it was reasonable. MCL 722.23(i). The court also found in regard to factor (*l*) that defendant's fiancée was credible when she testified that plaintiff had directed "mental violence" at the minor when disparaging defendant and his fiancée in the minor's presence. Given the deference we afford to the trial court's determinations regarding credibility, we find no error requiring reversal. See *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006) ("In reviewing the findings, this Court defers to the trial court's determination of credibility.").

Plaintiff, however, contends that the trial court erred in several of its findings. In regard to factor (e)—the permanence, as a family unit, of the existing or proposed custodial home—plaintiff alleges that her home was more permanent because the minor lived there with her brothers, the daughter of defendant's fiancée threatened to kill the minor, defendant was working full-time and going to school, and defendant's fiancée had problems raising her own daughters. Yet, plaintiff ignores the testimony that: one of the minor's brothers was away at college; the minor would call defendant complaining that her brother hit her; plaintiff testified that she had no problem with the minor spending time with defendant's fiancée; and the daughter of defendant's fiancée was immediately removed from defendant's home.[5] Plaintiff further ignores

[5] While plaintiff also argues that this situation constituted domestic violence against the minor under factor (k), it was an isolated incident that was immediately remedied. There is no basis to conclude that the trial court erred in declining to find factor (k) in favor of plaintiff.

that she worked as well, defendant was receiving help from his fiancée, and defendant testified that "if need be" he would not go back to school. As we have recognized, it is within the trial court's province to weigh the evidence and determine its credibility. *Sinicropi*, 273 Mich App at 155. Accordingly, plaintiff's claims are meritless.

As for factor (f)—the moral fitness of the parties—plaintiff protests that defendant exhibited poor moral fitness in recording her statements and in failing to notify her of the threat on the minor's life. However, defendant did not introduce any recorded statements during the hearing, and he explained that he was following CPS instructions when he waited to inform plaintiff of the threat.

Regarding factor (h)—the home, school, and community record of the minor—plaintiff argues that the minor's connections in Bay City are tenuous and she had a proven track record of success in West Branch. Although the minor may have more connections in West Branch, she also was subjected to significant bullying there, which plaintiff felt necessitated enrolling her in a new school. As plaintiff herself admitted, there was "a lot of fluidity" between students and faculty at the old and new school in West Branch. Conversely, attending school near defendant in Bay City was likely to remove the minor from the bullying she encountered in West Branch. Moreover, the minor only attended the new school in West Branch for about a month. Accordingly, we decline to adopt plaintiff's arguments that this factor clearly preponderated in her favor.

Plaintiff also contends that the trial court erred in deeming the minor's preference reasonable and favoring defendant, factor (i). Plaintiff posits that the trial court ignored the testimony of the minor's former religion teacher who claimed that the minor vacillated about whom she wanted to live with, as well as testimony from the minor's brother that she was nervous about the proceedings. None of this demonstrates error in the trial court's findings. The minor was approximately 10 years old when the court interviewed her, and the trial court reasonably concluded that she was of a sufficient age to express her preference. Moreover, we find no error in the trial court's decision to value the minor's preference expressed during the private interview more heavily than conflicting statements she may have made to other individuals.

Plaintiff also argues that under factor (*l*)—any other relevant factor—the trial court failed to consider defendant's testimony that he did not have a plan for taking care of the minor while working full-time and going to school. Although defendant said he was still "thinking about" how to manage his schedule, he also explained that "if need be" he would not go back to school, that he would be doing "independent study" and may not have to go to class at all, and that he would do most of his studying at night after the minor went to sleep. Plaintiff also ignores that she was a working parent as well. Thus, we do not agree that this factor clearly preponderated in favor of plaintiff.[6]

[6] Plaintiff also argues that factor (d)—the length of time the child has lived in a stable and satisfactory environment—favored her. The trial court agreed, although it found that this factor

Lastly, plaintiff argues that the trial court erred in considering the hearsay testimony of defendant's fiancée regarding the "mental abuse" plaintiff directed at the minor. This evidence constituted testimony that plaintiff called defendant's fiancée an "ugly welfare whore" and "white trash" and called defendant "dumb," "stupid," and "scary looking." However, plaintiff's statements were offered to prove the effect those statements had on the minor, not the truth of the statements, i.e., that defendant and his fiancée were those things. As the trial court correctly concluded, because plaintiff's statements were not "offered in evidence to prove the truth of the matter asserted," this was not hearsay. MRE 801(c).[7]

Accordingly, plaintiff has not established any error warranting reversal.

VI. CONCLUSION

The trial court did not err in finding an established custodial environment existed with both parents, or that a change of parenting time was warranted based on the minor's best interests. While plaintiff also requests reassignment to a different judge on remand, we have found no errors warranting reversal, nor do we find that plaintiff supported her request with persuasive reasons or legal support. We affirm.

/s/ Donald S. Owens
/s/ Christopher M. Murray
/s/ Michael J. Riordan

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only slightly favored plaintiff because the minor also had a stable and satisfactory environment with defendant. The trial court's findings were not in error.

[7] Alternatively, such statements were admissions by a party-opponent. MRE 801(d)(2). We also find that the trial court's use of the term "mental violence" was descriptive, and accurately characterized the trial court's finding that such slurs were emotionally damaging for the minor to hear.